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Nos. 83-1045 and 83-5878

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.
PETITIONERS

v.

ANTHONY PROVENZANO

ALFRED B. SHAPIRO AND GREGORY J. WENTZ,
PETITIONERS

v.

DRUG ENFORCEMENT ADMINISTRATION

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS FOR
THE THIRD AND SEVENTH CIRCUITS

MOTION TO VACATE

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The Solicitor General, on behalf of the petitioners in No. 83-1045 and the respondent in No. 83-5878, moves that the judgments of the courts of appeals be vacated and the cases remanded for further consideration in light of Section 2(c) of Public Law No. 98-477.

1. These cases, which were consolidated for purposes of oral argument, present the question whether Exemption (j)(2) of the Privacy Act of 1974, 5 U.S.C. 552a(j)(2), is a

withholding statute within the scope of Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3), and therefore prohibits an individual from obtaining disclosure of his agency records under the FOIA when access to those records is barred by the Privacy Act. On October 15, 1984, the President signed into law the Central Intelligence Agency Information Act, Public Law No. 98-477, Section 2(c) of which amends the Privacy Act by adding the following provision:

> No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

Under this new provision, it is clear that none of the Privacy Act exemptions, including Exemption (j)(2), may be invoked to bar disclosure of any record sought pursuant to the FOIA.

This new legislation plainly renders the question presented in these cases moot. The issue decided by the courts of appeals—whether, under the law as it existed prior to the recent amendment, the Privacy Act exemptions qualified as FOIA Exemption 3 withholding statutes—is no longer a "live" issue in these cases because, however the Court were to decide that issue, its decision would not affect the rights of the parties before it. These FOIA requests must be judged under the law now in effect. Accordingly, there is no case or controversy concerning the proper interpretation of prior law, and this Court lacks Article III jurisdiction to decide that issue. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *Powell* v. *McCormack*, 395 U.S. 486, 496 & n.7 (1969).*

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*Petitioners Shapiro and Wentz have filed a motion for summary reversal in No. 83-5878, arguing that Congress's recent action in amending the Privacy Act merely confirms that they were correct in their

2. Despite the mootness of the question presented, the cases themselves are very much alive, since the nongovernment parties still seek access to their agency records under the FOIA and the government, after processing those records, may still assert that the records, or parts thereof, are exempt from disclosure under one or more of the FOIA exemptions. Because this Court has previously determined that the issue decided by the courts of appeals warranted further review, and because the effect of the enactment of legislation mooting that issue is to eliminate the occasion for that review, we believe that the appropriate disposition would be for the Court to vacate the judgments of the courts of appeals and remand the cases for further proceedings in light of the intervening change in the law. The Court has consistently followed this course in similar circumstances. See, *e.g.*, *United States Nuclear Regulatory Comm'n* v. *Sholly*, 459 U.S. 1194 (1983); *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981); *IRS* v. *Fruehauf Corp.*, 429 U.S. 1085 (1977). Cf. *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

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interpretation of the relationship between the Privacy Act and the FOIA under pre-existing law. This motion for summary reversal is without merit for a number of reasons. First, it is well settled that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 9 (citations omitted); See *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 & n.13 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). At all events, because the prior status of the law is entirely academic in light of Public Law No. 98-477, any decision by this Court addressing petitioners' contention would necessarily constitute an advisory opinion, which is barred by Article III. Petitioners cite no authority in support of their peculiar suggestion.

It is therefore respectfully submitted that the judgments of the courts of appeals should be vacated and the cases remanded for further consideration in light of Section 2(c) of Public Law No. 98-477.

REX E. LEE
Solicitor General

OCTOBER 1984

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